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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 881

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JOHN SITTNER, d/b/a SITTNER'S AUTO WRECKING; FRANK LENCI, d/b/a FRANK'S AUTO WRECKING CO.; FITZ AUTO PARTS, INC.; RIVERSIDE AUTO WRECKING; LINCOLN AUTO AND TRUCK WRECKING; TRUCK EQUIPMENT CO.; FERRILL'S AUTO WRECKING; EDWARD J. PRESTEK; M. BLOCH AND CO. INC.; BOB'S AUTO WRECKING; GENERAL AUTO AND TRUCK WRECKING; SEATTLE IRON AND METALS CORP.; LURIA BROS. AND CO., INC.; STERNOFF METALS CORP.; PACIFIC IRON AND METAL CO.; REX AUTO WRECKING; ANDERSON'S AUTO WRECKING; SOUTH END AUTO WRECKING; NEWTON AUTO PARTS; JOE W. MCCUTCHEN; COMMERCIAL TERMINALS CO.; M. G. VAN DYKE; SAM'S BONDED AUTO WRECKERS; L. E. SEXTON; and FARWEST AUTO WRECKING CO., INC.,
Petitioners,

vs.

CITY OF SEATTLE, a municipal corporation, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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CITY OF SEATTLE, a municipal corporation, *Respondent*.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent The City of Seattle, pursuant to Rule 24 of the Revised Rules of this Court, herewith submits its brief in opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Washington herein.

QUESTION PRESENTED

The sole question presented by Petitioners' Application for Writ of Certiorari is whether Ordinance 90000 of The City of Seattle, Washington, in regulating emissions from "heat processing equipment" by means of weight control rather than visual control which applies to other sources of air contaminants, is repugnant to the Fourteenth Amendment of the United States Constitution on the ground that such classification for purposes of regulation is unreasonable.

STATEMENT

With respect to the classification here, the trial court in its memorandum decision (R. 0254) stated as follows:

> "Now the fact that the city has determined that some emissions should be measured by their opacity and some by weight does not violate the accepted provisions, case law, when measured against the terms of distinction based upon reasonable grounds. I do not find as a matter of law any class discrimination. As a matter of fact I believe there is a real and substantial difference between the emission of dust from heat processing equipment and the emission of smoke from other sources, for the reason that the former are necessary results of manufacturing processes during which substantial material changes form and the latter is chiefly the result of the disposal of waste matter or the inefficient operation of heating facilities. I believe that in form and in fact that this is a reasonable distinction to be made with a definite and acceptable place in practice and in fact. I believe that

The City of Seattle under the cases has the right, should it so choose, to make that determination. In my opinion the need of each class of business must be and undoubtedly has been considered. For this reason heat processing equipment has been treated separately, not only because its effluent is better measured in terms of weight than in the instance of smoke but in this legislative determination the people have determined that the need is greater in the one case when compared to the public health and safety and the demand of this city than in the other, and I find nothing in that conclusion contrary to the form and spirit of our case law."

REASONS FOR DENYING THE WRIT

That air pollution is a proper subject for control by the municipal police power is not subject to question. As stated by this Court in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 4 L.ed.(2d) 852, 80 S.Ct. 813:

> "The ordinance was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."

See also *Northwestern Laundry v. Des Moines*, 239 U.S. 486, 60 L.ed. 396, 36 S.Ct. 206.

The standard of judicial review of legislative enactments against allegations of unreasonable classification is familiar. As stated in *McGowan v. Maryland*, 366 U.S. 420, 6 L.ed.(2d) 393, 81 S.Ct. 1101:

> "The standards under which this proposition is to be evaluated have been set forth many times by

this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Comrs.*, 330 U.S. 552, 91 L.ed. 1093, 67 S.Ct. 910; *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 79 L.ed. 1070, 55 S.Ct. 538; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.ed. 369, 31 S.Ct. 337, Ann. Cas. 1912C 160; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 43 L.ed. 909, 19 S.Ct. 609."

In this case Petitioners' business activities include the burning of salvaged metals by twenty of said Petitioners as an incident of the auto wrecking business. The emissions of smoke from such burning process are regulated under Seattle Ordinance 90000 by the use of the "Ringelmann Smoke Chart," a method of visual measurement of air contaminants. Petitioners complain that the measurement of emissions from "heat processing equipment," defined in said ordinance as "industrial furnaces or comparable devices, the principal purpose of which is the processing of material through the use of heat," by use of a weight table rather than by a visual smoke chart, constitutes an unreasonable classi-

fication, and is therefore contrary to the United States Constitution.

It must be emphasized that Seattle Ordinance 90000 does not *exempt* emissions from heat processing equipment from regulation but simply measures the emission therefrom by weight rather than the visual process.

As clearly pointed out by the trial court, such classification is based on the fact that emissions from heat processing equipment can be better regulated by weight control than by visual control methods.

Petitioners cite but one case in support of their Petition, *State ex rel. McCue v. Sheriff of Ramsey County*, 48 Minn. 236, 51 N.W. 112, which was decided in 1892. In that case a smoke control act completely exempted from its application all "manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building, where they are generated or within a radius of three hundred feet therefrom."

The Court stated at page 113 that the "only fair and reasonable construction to be given it (the Act) is that it is intended to except a class of manufacturers who limit the use of the heat, light and power resulting from the combustion of smoke-producing material wholly within the prescribed radius," and concluded that the classification "was not sufficiently broad" and was "arbitrary" and held the act invalid.

The case at bar is distinguishable because the Seattle ordinance regulates all emissions of dust and smoke, the classification being one based on the type of equipment

producing the emission of air contaminants and then only for the purpose of measurement thereof.

Following are cases illustrative of instances in which legislative classifications have been upheld with respect to smoke control ordinances:

In *People v. International Steel Corp.*, 102 Cal. App. Sup. 935, 226 P.(2d) 587, the California Court upheld a regulation which exempted completely certain agricultural operations and set forth special rules for application to certain orchard heaters, and observed that nothing in the record upset the presumption that such classification was reasonable.

In *Moses v. U. S.*, 16 App. D.C. 428, 50 L.R.A. 532, an Act of Congress regulating the emission of smoke within the District of Columbia was upheld as nondiscriminatory despite the fact that emissions from private dwellings were totally excluded, the Court of Appeals observing that all parties within the respective classes were treated alike.

In *State v. Tower*, 185 Mo. 79, 84 S.W. 10, the Missouri Court upheld a smoke control ordinance which expressly exempted from its operation smoke emitted from locomotives and steamboats.

In *Board of Health v. New York Central Ry. Co.*, 4 N.J. 293, 72 A.(2d) 511 (1950), it was held that smoke emitted from one and two-family residences could lawfully be excluded from a smoke control ordinance.

In *State v. Chicago, Mil. & St. Paul Ry.*, 114 Minn. 122, 130 N.W. 545 (1911), an ordinance relating to the use of soft coal and excluding locomotives from its op-

eration was upheld as setting forth a reasonable classification.

In *City of Brooklyn v. Nassau Elec. Ry. Co.*, 44 App. Div. 462, 61 N.Y.S. 33, legislation prohibiting the burning of soft coal within four miles of the City Hall, with certain exceptions, was upheld against the argument that such constituted an unreasonable classification.

CONCLUSION

Petitioners have presented no argument to support a grant of their Petition for Certiorari because of "special and important reasons therefor" and Petitioners have failed to show that a federal question of substance is presented or that the decision of the Washington State Supreme Court is inconsistent with any applicable decision of the United States Supreme Court as contemplated by Rule 19 of the Revised Rules of this Court, and Respondent therefore respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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